SUPERIOR OIL COMPANY, APPELLANT;
CLEVELAND-CLIFFS IRON COMPANY AND
SOHIO SHALE OIL COMPANY, INTERVENORS

IBLA 80-864 Decided December 16, 1983

Appeal from a decision of the Colorado State Office, Bureau of Land Management rejecting appellant's application to exchange its private oil shale land for federal oil shale land. CO-946; C-19958 Rev.

Affirmed.

1. Exchanges of Land: Generally -- Federal Land Policy and Management Act: Exchanges -- Hearings -- Mineral Lands: Generally

An application for an exchange of land pursuant to sec. 206 of FLPMA requires first a determination that the public interest will be well served by the exchange and, second, that the total value of the Federal land does not exceed the value of the offered land by more than 25 percent. Where, during the pendency of an appeal from the rejection of a proposal to exchange oil shale lands, certain economic events occur which both diminish the advantage of the exchange to the public interest and increase the disparity in the relative values of the offered and selected lands, the decision will be affirmed without an evidentiary hearing on the previous evaluations of the two properties.

APPEARANCES: R. T. Robberson, Esq., Gregory E. Simmons, Esq., Houston, Texas, for Superior Oil Co.; R. Blain Andrus, Esq., Rifle, Colorado, W. A. Beck, Esq., Cleveland, Ohio, for Cleveland-Cliffs Iron Co.; Robert A. Johnson, Esq., and Richard J. Goetsch, Esq., Cleveland, Ohio, for Sohio Shale Oil Co.; Lowell L. Madsen, Esq., Denver, Colo., Departmental Counsel.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On November 30, 1973, Superior Oil Company (Superior) initiated an exchange proposal with the Bureau of Land Management (BLM), whereby Superior

offered a parcel of 2,571.51 acres of private land in exchange for a federally-owned parcel of 2,045 acres. Subsequently, BLM considered the exchange application pursuant to the authority of sec. 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1716 (1976). All of the lands affected lie within two adjacent townships in the Piceance Creek Basin in Rio Blanco County, Colorado. 1/

In addition to the offered land, Superior owned the surface and mineral rights to 590 acres of adjacent or nearby land. Superior contemplated purchasing another 400 acres (surface estate only) owned by the State of Colorado Division of Wildlife. The land thereby retained by Superior and acquired by the proposed exchange and through purchase from the State, would form a more economically feasible mining unit than could be enjoyed by Superior otherwise.

The mining project envisioned by Superior anticipated the mining of oil shale containing the minerals nahcolite and dawsonite. Nahcolite is a naturally occurring sodium bicarbonate, while dawsonite yields alumina and soda ash. Oil shale, of course, can be processed for the production of an oil similar in all material aspects to petroleum oil.

Value appraisals of the mineral resources in the offered and selected lands were performed by both the Geological Survey (GS) and by Superior. Also, BLM accomplished an extensive draft environmental statement, which was later reviewed by the Environmental Protection Agency and held to be "inadequate." 2/ GS completed its evaluation report on January 11, 1980,

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1/ The lands involved are:

"Sixth Principal Meridian, Colorado

Non-Federal Lands	Federal Lands
T. 1 N., R. 97 W.	T. 1 N., R. 97 W.
sec. 6, Lots 3, 8, 9, 10, 11, E1/2SW1/4 and SE1/4NW1/4;	sec. 1, Lot 32 and SW1/4W1/4; sec. 2, Lots 4, 17, 21, 23
sec. 7, Lots 5, 6, 7, 8, E1/2 and E1/2W1/2;	28, 30, 31, 34, 35, 38, 39 and 42;
sec. 8, S1/2;	
sec. 9, S1/2;	sec. 11, E1/2E1/2;
sec. 10, W1/2;	sec. 12, W1/2NW1/4
sec. 16, NE1/4;	sec. 21; sec. 22;
T. 2 N., R. 97 W.,	sec. 27, N1/2NW1/4;
sec. 30, Lots 7, 8 and E1/2SW1/4;	sec. 28, N1/2N1/2.
sec. 31, Lots 5, 6, 7, 8, and E1/2W1/2.	
Containing 2571.51 acres.	Containing 2045 acres."

2/ The first finding of inadequacy concerned BLM's "failure to fully evaluate direct lease of the same [selected] land." Oil shale is a mineral specifically leasable under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 241 (1976).

and submitted minor modifications thereof on February 5, 1980. Superior reviewed this report and proposed changes, whereupon GS again analyzed the economic resource values in a report dated April 10, 1980. The conclusion reached by GS was that the value of the mineral resources in the selected land far exceeded the 25 percent differential which, under sec. 206 of FLPMA, is permitted for exchange upon payment of the difference in cash.

Accordingly, by its decision of July 3, 1980, BLM rejected the exchange proposal, and Superior filed this appeal.

In its initial submission on appeal Superior complained, inter alia, that although it had cause to believe that the GS evaluations of the respective properties were erroneous, Superior was handicapped in so demonstrating because GS had refused to provide Superior with the data, information, economic assumptions, guidelines, reports, and methodology utilized by GS in its comparative analysis. This complaint eventually was obviated by the action of this Board, which obtained the materials from GS and made them available for review by Superior. This was done not because of any perception by the Board that Superior had a legal right to review the information and computations involved in formulating the conclusions of GS, but because there was no apparent reason to withhold such information from the appellant in this instance.

In the interim Superior conveyed some of its interest in the offered land to Sohio Shale Oil Company and Cleveland-Cliffs Iron Company, and these firms were allowed to intervene in support of Superior's appeal as proponents of the exchange.

It must be understood that Superior had proposed a definite, detailed project, with a specific timetable for the construction of facilities and the extraction and beneficiation of specific projected quantities of minerals, of which shale oil would be the most valuable, and without which the venture could not even be contemplated. For example, part of that timetable offers the following assumptions:

Product	Timetable	Assumed Average Daily Production	Total Project Production
Nahcolite	1983 to 2006 (23 yrs)	4,878 tons	40,290,000 tons
Shale Oil	1987 to 2006 (20 yrs)	11,586 barrels	84,578,000 barrels
Alumina	1987 to 2006 (20 yrs)	580 tons	4,234,000 tons
Soda Ash	1987 to 2006 (20 yrs)	1,005 tons	7,337,000 tons

One of the assumptions on which the GS valuation report was premised was that "The projected mining units would be diligently developed." Indeed,

a study of that report confirms that many of the factors were time-oriented to such a degree that a substantial readjustment would now be required to give it current efficacy. Prices, interest rates, costs, taxes, etc., have altered significantly, affecting the projections which were the basis of certain conclusions.

However, the crux of the controversy between Superior and BLM is a constant, not a time-variable. It is explained in the following excerpt from the statement of George L. Turcott, Associate Director, BLM, before the House Subcommittee on Energy Production and Supply of the Committee on Energy and Natural Resources, made May 24, 1977.

> The Department's preliminary evaluation of Superior's land and the public land that Superior desires to acquire shows that with a basic assumption of 25 gallons per ton of oil shale equivalent as the cut-off grade, the public land has significantly greater amounts of recoverable reserves of oil shale, alumina, and nahcolite than the Superior lands. However, changing the basic assumption to a cut-off grade of 20 gallons per ton of oil shale equivalent, the Superior lands have greater amounts of recoverable oil shale and alumina reserves and the public lands have greater reserves of nahcolite. The general reason for the difference in values as the grade assumption changes is that the Superior lands have large deposits of lower grade oil shale.

Superior contends that the cut-off grade should have been pegged at below 25 gallons per ton, so that at significant value could be accorded the large quantity of lower grade shale in the offered lands.

Another constant factor involves the GS determination that the offered lands do not comprise an economic mining unit, whereas the selected lands do. Superior disagrees.

While the case was pending before this Board a number of economic events occurred in rapid succession which had an obvious impact on the oil industry generally and the several oil shale projects already scheduled or in progress, which were precipitously abandoned. Recognizing this, the Board issued its order of September 23, 1982, the text of which is as follows:

ORDER

> The case is one in which this Board is called upon to decide between the diverse economic evaluations of the offered and selected lands. The value appraisals of each of the parties are dependent upon the economic worth of the respective properties. Each of the parties has premised its appraisals on the value of the mineral in place according to a schedule of development projected by the appellant, which schedule has already been delayed by several years in consequence of BLM's decision and the resulting

appeal. To a large extent, the appraisals are dependent upon each party's projection of the quantity, grade and value of minable ore in place, which in turn is calculated to a significant extent on the projected unit value of the shale oil, alumina and soda ash, vis-a-vis the projected cost of mining, beneficiation, and marketing at the scheduled time of extraction.

The Board is obliged to take official notice pursuant to 43 CFR 4.24(b) of the altered economic circumstances which have influenced the incipient oil shale industry since the BLM decision was issued and this appeal was filed.

The Board is concerned that the basis upon which the appraisals before it were made may no longer be valid, even in the eyes of those who prepared them.

Moreover, the Board notes that no value was ascribed by BLM to the public interest aspects of the generation of taxes, employment, advancement of domestic energy independence, or even to the blocking of Federal land, which would result from appellant's proposal if that proposal were to be fully implemented as it is now presented on the record before us, adjusted for the procedural delay. The Board is cognizant of the issue that such public interest considerations perhaps may not properly be taken into account pursuant to 43 U.S.C. § 1716 (1976) in the appraisals of the values of the individual properties.

Accordingly, before proceeding with an adjudication of this appeal on the basis of what may be obsolescent information, the Board desires the parties to provide the following:

1. A statement by appellant as to whether it will proceed to implement the mining operation as proposed in accordance with the schedule provided in support of its exchange application (adjusted only for the procedural delay arising from this appeal), should the exchange be consummated.

2. Statements by both appellant and Departmental counsel on behalf of BLM and Minerals Management Service (vice Geological Survey) regarding the continuing efficacy of the appraisals which comprise the record before us in view of (1) the procedural delay already experienced, and (2) the alteration of economic circumstances peculiarly referable to oil shale development which has transpired in the interim.

3. A statement by each of the parties with respect to its position concerning whether the

> Department is permitted or obliged to factor in values which may be ascribed to enhancement of the public interest in consequence of the exchange (43 U.S.C. § 1716(a)), or whether such considerations are precluded in making a determination of the respective values of the properties to be exchanged pursuant to 43 U.S.C. § 1716(b).
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> 4. A statement by each of the parties as to whether, in the opinion of each, the appraisals now of record constitute an adequate basis for decision by the Board, or whether the record must be supplemented. If it is asserted by either or both parties that the present record is inadequate, such assertion(s) should be accompanied by proposals for proceeding henceforth, which proposals may take the form of motions or mere suggestions.
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> Each of the parties will submit responses to this order within 45 days from date hereof.

The scheduled responses to this order were stayed on the motion of Superior pending certain revisions of the Departmental regulations and policies relating to such exchanges. However, upon final promulgation of those revisions, the Board afforded the parties an opportunity to comment on their relevance to the issues presented. Upon review of the respective responses, the Board concluded that the revisions did not control the outcome of this adjudication. Accordingly, by our order of July 1, 1983, the Board directed the parties to file their responses to the questions propounded in the order of September 23, 1982, supra.

Superior and the intervenors responded jointly, stating, in part, as follows:

> NOW THEREFORE, Respondents in answer to the order of September 23, 1982, make the following statements:
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> (1) With regard to the implementation of the mining operation upon approval of the Exchange Application, Respondents, due to economic, environmental and operational uncertainties associated with the implementation of the mining operation, are not able to determine, with reasonable certainty at this time, if the mining operation, as proposed in accordance with the schedule provided in support of the Exchange Application, will be implemented;
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> (2) With regard to the continuing efficacy of the appraisals which comprise the record of this appeal as a result

of procedural delay and alteration of economic circumstance, Respondents, due to economic, environmental and operational uncertainties associated with the mining operation, are not able to determine, with reasonable certainty at this time, the effect of such procedural delay or alteration of economic circumstances on the efficacy of the appraisals;

(3) With regard to the obligation of the BLM to consider values ascribed to the enhancement of the public interest the BLM should, consistent with Federal Statute, BLM regulations and guidelines, and Congressional Committee intent, consider the economic value of the public interest aspects of the generation of taxes, employment, advancement of domestic energy independence and the blocking of Federal land;

(4) With regard to the adequacy of the BLM's appraisals which comprise the record of this appeal as a basis for administrative review by the Board, such appraisals are inadequate, mistaken and contrary to mining custom and practice for the following reasons: [omitted].

BLM's response to the order stated, in part:

It is the position of the BLM that the appraisals of record are accurate reflections of the relative values of the offered and selected lands and that these appraisals have continuing efficacy; that the BLM must consider "values which may be ascribed to enhancement of the public interests" in determining whether the approval of an exchange application is in the public interest; and that the appraisals now of record constitute an adequate basis for a decision by the Board in this case.

* * * * * * *

The BLM's initial review, analysis, and decision regarding the Superior exchange application was based on information supplied by the applicant and used with DCF (discounted cash flow) model. Necessary assumptions which modified the data were agreed upon by Government and Superior Oil Company engineers. Consistent and equitable assumptions were applied equally to the offered and selected lands. The summation of this effort and the decision to deny the exchange are not influenced by recently adopted guidelines or by alterations of economic circumstances. The grade of oil shale and nahcolite in the selected lands is substantially better than that in the offered lands. This fact has not changed and precludes approval of the exchange.

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> Fluctuations in the prices and costs of oil, soda ash, and alumina potential products of the mineral deposits in the offered and selected lands affect the values of those lands similarly, and thus do not affect the basis for the denial of the exchange.
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> In the DCF models used by the Minerals Management Service, the same cutoff grade for offered and selected lands were assumed. The run of mine of the selected property was higher than for the offered. The disparity was substantial. In today's potential markets, the cutoff grade would have to be higher, and the disparity in ROM would be even greater. Accordingly, altered economic circumstances do not favor a land exchange.
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> * * * [I]t is also the position of the BLM that the record now before the Board provides and [sic] adequate basis for decision. Although the appraisals found therein might require some technical adjustments in view of recent events, those appraisals continue to reflect the relative values of the offered and selected lands.

Following the foregoing responses, Superior filed a motion for an evidentiary hearing, asserting that the Government's economic evaluation report, as amended, contains "mistaken calculations and conclusions of a substantial nature and magnitude," which could be better shown with demonstrative evidence and oral testimony.

BLM promptly filed its objection to Superior's motion, asserting that the record now before the Board provides an adequate basis for decision.

[1] The Board agrees that the matter may be decided on the basis of the present record.

As indicated above, one of the most critical concerns in the evaluation of the mineral resources in the respective properties is the cut-off grade of the oil shale; i.e., the grade below which the material cannot be extracted, beneficiated, and transported at a profit. The offered lands contain vast quantities of shale which would yield less than 25 gpt. The selected lands have far more shale graded above 25 gpt than do the offered lands. Appellants set the cut-off at 20 gpt, which would substantially enhance the value of the offered lands if, in fact, shale containing less than 25 gpt could be handled profitably. BLM insisted that 25 gpt was the economic cut-off.

Time and circumstances appear to have resolved this issue against appellants. Regardless of whether the cut-off was properly established at 20 or 25 gpt (or somewhere between) in 1980, the economic alterations in the petroleum and oil shale industries which have occurred since then can only be

perceived as having raised that cut-off significantly, diminishing the value of the lower grade in the offered land and increasing the value disparity between it and the selected lands.

The Government's evaluation also concluded that the offered lands did not comprise an independent economic mining unit, whereas the selected lands did. This was disputed by appellants, who contended that the offered tract was indeed susceptible to hosting an independent oil shale mining operation. However, as proposed, appellant's mining operation of the higher grade oil shale on the selected land was dependent for its success to a significant extent on its recovery of nahcolite and dawsonite as well. BLM asserts that minable nahcolite does not occur in significant quantities in the offered lands. Given the lower grade of the oil shale there, the current state of oil shale economics, the paucity of recoverable nahcolite, and the physical circumstances which affect the feasibility of mining the offered lands, the Board concludes that the offered lands do not comprise an independent economic mining unit.

The many affirmative public interest values which apparently would derive from a consummation of the exchange and implementation of appellant's mining plan might be viewed as offsetting the perceived disparity in the mineral values of the two tracts, assuming that public interest values could lawfully be applied in that fashion. However, aside from the incidental value of "blocking up" some public domain lands, most of the other public interest values lie not in the exchange of lands per se, but in the successful implementation of the mining operation itself, as proposed by Superior. This aspect of the matter was touched upon briefly by Associate Director Turcott in his statement to the House Subcommittee, supra, as follows:

> Another concern is whether we have adequate means to assure that the maximum public benefit will be derived from the exchange. One of the main public benefits would be the commercial trial of Superior's multi-mineral oil shale recovery process. However, in the event that Superior should decide to shelve its plans to proceed with the oil shale trial once the exchange is consummated, all public benefits associated with the trial would be lost.

It now appears that appellants are unwilling to provide any assurances that they intend to proceed with the proposed plan even if they acquire the selected land. As recited above, our order of September 23, 1982, took note "of the altered economic circumstances which have influenced the incipient oil shale industry since the BLM decision was issued and this appeal was filed," and called upon Superior to state whether it would proceed to implement the mining operation as scheduled should the exchange be consummated. Appellants' reply, dated August 24, 1983, stated that "due to economic, environmental and operational uncertainties associated with the implementation of the mining operation, [we] are not able to determine, with reasonable certainty at this time if the mining operation, as proposed in support of the Exchange Application, will be implemented."

Section 206 of FLPMA requires that the Secretary find "that the public interest will be well served by making that exchange." Given the state of the matter at the present time, we perceive no basis on which such a finding might be made or sustained. Regardless of the economic effect of such public interest considerations as the generation of taxes, employment, and the advancement of energy independence, they cannot be considered if they are merely hypothetical or conjectural. Without a firmly based finding that the public interest will be well served by this exchange, there is no need to further belabor the asserted disparity of land values in an effort to reconcile them within the 25% range required by statute which could then be equalized by cash payment. Nevertheless, the Board finds that the decision of BLM, rejecting the application because the value of the selected mineral estate "far exceeds the 25% differential" in the value of the offered estate, is adequately supported by the record, and that there is no need to pursue that issue further.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellants' motion for an evidentiary hearing is denied, and the decision appealed from is hereby affirmed.

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Edward W. Stuebing
Administrative Judge

We concur:

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Bruce R. Harris
Administrative Judge

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James L. Burski
Administrative Judge